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I. INTRODUCTION: SELF-DETERMINATION AND IMPOSED FREEDOM

In the relatively short history of modern constitutionalism, constitution-making has been an act of political liberation from regimes whose legitimacy had been compromised. True, there were exceptions. In 19th century Germany during the constitutional struggles between the monarchy and democratic forces, constitutions were periodically imposed by an autocratic monarch.[1] But after the universal triumph of the principle of popular sovereignty in the decades after World War II, today the normative force of constitutions rests upon the constituent power of the people.[2] Constitution-making has been tantamount to a people's aspiration to disrupt the continuity of their political system and to found a new polity.[3] Until recently, this seemed to be an axiom of political philosophy and constitutional theory. However, this view has now been placed into question by the emergence of constitutions which do not originate from, or pay little regard to, the constituent power of the people.

Two instances come to mind. The first is the transformation of the formerly communist regimes in Central and Eastern Europe through revolutions[4] involving some kind of constitution-making.[5] What strikes the student of modern constitutional history as remarkable is the "notable absence of constitutional constituent assemblies,"[6] or any other kind of constituent power. These transformations may give rise to a new variety of constitutionalism characteristic of societies in transition from authoritarian to democratic rule, which one could term "constitutionalism of transition."[7] The second instance is coerced regime change from outside through the imposition not just of new rulers, but of a constitution aimed at sustaining the more or less violent conversion of an autocratic regime to a democratic system. The obvious case is Iraq where the United States, after the military defeat of the Saddam Hussein regime, established an interim constitution, soon followed by a constitution drafted by Iraqi political forces under the auspices of the Americans.[8] The inauguration of democratic constitutions in Germany and Japan after World War II by the Western Allies and the Americans,

1. 2 E.R. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789, at 763 (2d ed. 1968); 3 E.R. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789, at 11, 29, 35.

2. *See* THE PARADOX OF CONSTITUTIONALISM (Martin Loughlin & Neil Walker eds., forthcoming June 2007).

3. *Cf.* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 14, 46 (1992) (discussing constitution-making as the top priority in a revolutionary situation); *see also* ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 81–89 (Deborah Lucas Schneider trans., 1995).

4. *See* ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 81–129 (2000).

5. JON ELSTER ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 63–108 (Robert E. Goodin et al. eds., 1998).

6. Ruti Teitel, *Post-Communist Constitutionalism: A Transnational Perspective*, 26 COLUM. HUM. RTS. L. REV. 167, 172 (1994).

7. *See id.*; Ruti Teitel, *Transnational Rule of Law, in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 279 (Adam Czarnota et al. eds., 2005).

8. *See* Andrew Arato, *Interim Imposition*, 18 ETHICS & INT'L AFF. 25, 36 (2004).

respectively,[9] is largely seen as the historical precedent of what one may call heteronomous constitutionalism.

This article addresses the question of whether we are currently witnessing modes of nation-building or regime change in which the connection between popular self-determination and constitution-making is dissolved or at least significantly loosened. This article will proceed in the following steps: Part II contains a brief discussion of the ambiguous relationship between constitution-making and political freedom, and addresses the question of whether heteronomous constitutions can be legitimized. Part III describes a relevant case study, the history of the German Basic Law, which was inspired by the three Western Allies after they defeated and occupied Germany. Part IV discusses which societal preconditions must be met for an imported constitution to be compatible with the receiving social structure of a particular country and become the accepted normative foundation of the polity. Amongst numerous preconditions, two will be examined more closely, the first being statehood and secularization and the second being ethnic and religious homogeneity. In Part V, this article will scrutinize the role of the international community as an external actor in the creation of new constitutions for conflict-ridden societies and ask whether it is justified to speak of an emerging paradigm of constitutional interventionism. Finally, Part VI will conclude with a brief summary of why regime change through the coercive transplantation of constitutions is a promising venture.

II. HETERONOMOUS CONSTITUTIONS?

Heteronomous constitutions seem possible if one reconsiders the connection between constitutionalism and autonomy. In the history of modern constitutionalism, constitutions have always been considered the embodiment of a people's self-determination as expressed by its constituent power. Constitutions are the product of severe conflict in society. Even constitutions following the paradigm of constitutionalism of transition, and its inherent tendency towards legal continuity,[10] have not been created in times of political routine. Constitutions are symbols of a new political beginning after the past order has been brought to an end in a more or less violent and abrupt manner. In a socio-political perspective, constitutions can be regarded as a ceasefire agreement or a peace treaty between social forces struggling for power in a polity. Constitutions come into being after a revolution or war, but in either case the people are deeply involved. After a

9. *See* Nevil Johnson, *Constitutionalism in Europe Since 1945: Reconstruction and Reappraisal*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 26 (Douglas Greenberg et al. eds., 2001); Hideo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and West German Constitutions*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 43 (Yoichi Higuchi ed., 2001); *see also* PETER H. MERKL, THE ORIGIN OF THE WEST GERMAN REPUBLIC (1963) (detailing the specifics of the German case).

10. *See* ARATO, *supra* note 4, at 171.

revolution — the most intense kind of internal social conflict — the triumphant forces lay out their principles of how society should be ordered. This is tantamount to imposing their rule upon the defeated groups who are then usually denounced as "counter-revolutionary," "reactionary," or sometimes even as "enemies of the people." Constitution-making after a war is not very different. If the war was lost, then the demoralized masses place the blame for their defeat and sufferings on the now "old regime," which has proved itself unable to defend the essential interests of the nation. They throw their rulers out of office and the desire for a new beginning manifests with the demand for a new constitution expected to reflect their needs, hopes, and aspirations.[11] But even after a victorious war, a new distribution of power, i.e. a new constitution, is on the agenda of the nation. The people want recognition and remuneration for their sacrifices and hence demand a new distribution of the benefits of the social compact.[12]

If constitution-making is a phenomenon of citizens' activation, then the idea of imposing a constitution upon a nation appears odd and incoherent. Imposition means degrading the people to a thoroughly passive and subaltern status which is exactly what constitutionalism is supposed to overcome in the first place.[13] On the other hand, we must not forget that since its historical breakthrough at the end of the 18th century, modern constitutionalism has been characterized by its universalist imprint. The invocation of inalienable rights of men in the American and French Revolution demonstrates that the benefit of political freedom — the core of modern constitutionalism — was not thought to be limited to those peoples who had been lucky enough to liberate themselves; rather, true freedom could only be enjoyed if it was shared with all other peoples. This is unmistakably expressed in the wording of the draft for a resolution of the French National Assembly written by Deputy Volnay in May 1790:

> The Assembly solemnly declares:
> 1. that it regards the entire mankind as a single and identical society whose goal is the peace and the happiness of all and every single of its members;
> 2. . . .
> 3. . . . that, consequently, no people has the right to take possession of the property of another people or to deprive it of its freedom and its natural advantages;
> 4. that every war fought for another motive or purpose but the defence of a just cause is an act of oppression which every great soci-

11. This pattern surfaced in Germany after World War I and in France after World War II and reemerged in the post-communist countries of Central and Eastern Europe after 1989.

12. The British welfare state set up by the Labour government after World War II is an obvious example.

13. *See* Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 9 (Douglas Greenberg et al. eds., 1993); *see also* PREUSS, *supra* note 3, at 109.

> ety has to stand up against because one state's invasion of another one tends to menace the freedom and security of all.[14]

This principle did not prohibit the use of force to liberate a people living under the rule of a tyrant. Freedom was considered a benefit which rightly belonged to all, and spreading liberty worldwide was considered a service to mankind. On December 15, 1792, the French Revolutionary Convention expressed this idea in a "Proclamation to the liberated peoples" in which it solemnly declared:

> Friends and Brothers, we have conquered liberty, and we shall maintain it. We offer you the enjoyment of this inestimable benefit which has always been our right, and of which our oppressors have not been able to deprive us except by crime. We have chased away your tyrants; show yourselves to be free men, and we will guarantee you from their vengeance, their projects and their return . . . .[15]

What follows are the declarations of the French Revolution, using almost the same language as the preamble to the Declaration of the Rights of Man and Citizen of August 26, 1789. In other words, liberty is a universal good which must not be restricted to a particular nation, moreover, its principles and demands are everywhere the same. In view of this there is no principal difference between the self-liberation of a people and its liberation through others. Consequently, Bonaparte's crusades, which expanded French domination over almost the entire European continent and beyond, were wars of liberation through which he intended to spread the universalist message of the French Revolution over the "backward countries."

While the universalization of freedom (and constitutionalism, its institutionalized paradigm) promised the liberation of mankind from the evils of oppression and tyranny, the realization of this high-spirited project entailed a major problem: The distinction between imperialism and liberation was blurred, and this was tantamount to confusing liberty and tyranny. Can we conceive of the paradox of "imposed freedom?" To liberate a people means to eliminate an obstacle — for example, an authoritarian ruler — which prevents them from doing what they could otherwise do. This definition refers to Isaiah Berlin's famous notion of negative freedom.[16] Negative freedom presupposes that the obstacle is perceived as just that, an obstacle which stands in the way of the actions which one would otherwise perform. If people regard their rulers as a barrier to freedom, the removal of this barrier by the army of a benevolent neighbour is an act of liberation, not of imposition (which presupposes a certain degree of coercion). If the people accept their rulers and do not consider them to be illegitimate,

14. 2 FONTES HISTORIAE IURIS GENTIUM: QUELLEN ZUR GESCHICHTE DES VÖLKERRECHTS 646 (Wilhelm G. Grewe ed., 1995).

15. *Id.* at 656.

16. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122 (1970).

the removal of the rulers by a benevolent third party is not liberation, but the imposition of a way of living which they did not choose. Thus, "imposed freedom" is a contradiction in terms: Either I am liberated in that my ruler who is a blockage to my freedom is removed — whoever removes it, the result is in accordance with my will and hence not imposed. Or the ruler is removed whom I do not regard as a barrier to my freedom — the removal may open hitherto unavailable options for me, in any case these options have been created against or at least without my will; hence they are imposed upon me.

But for some this may seem an overly simplistic criterion of liberty. It is possible that somebody lives under the rule of an oppressor but does not know what it means to be free, i.e. to enjoy new options. If so, then a person can only be free if he is truly autonomous and in full possession of his human capacities, and therefore capable of distinguishing freedom from enslavement. This is basically the argument that leads to what Berlin calls positive freedom. The idea of positive freedom assumes that other persons simply do not know what is good for them, and we are fully justified in coercing them to accept what we have identified as valuable, in fact indispensable, to their true Self.[17] An example of this idea is a parent's right and duty to educate his or her children. Viewed as such, imposing freedom on others is not necessarily self-contradictory.

But imposing a constitution is a different case. Constitutions are complex devices which presuppose the political majority of the people living under it. Constitutions impose restraints on the members of a polity by limiting freedom. But, it is their paradoxical quality that they limit freedom for the sake of increasing freedom, that they are mechanisms of autopaternalism through which the members of a would-be-polity create the appropriate tools for coping with challenges and future contingencies.[18] What at first glance appear to be merely limiting and disabling schemes — for instance the separation of powers, the guarantee of fundamental rights for individuals as insurmountable barriers to governmental intrusion, or the establishment of constitutional courts and their authority to review legislative acts — are devices which enable reflection, deliberation and collective learning.[19] Most importantly, a constitution can play this enabling role only to the degree that it is a self-binding mechanism. It must be self-imposed so that its restraining force is seen as a means of achieving freedom, not incapacitation and bondage. Thus, the liberation of a people cannot occur through the imposition of a constitution.

If imposing a constitution upon a people is not a reasonable option, then liberating a people from their oppressors would only make sense if the people were able to mobilize their own constitution-making capacities. One could hy-

17. *Id.* at 132.

18. Stephen Holmes, *Precommitment and the Paradox of Democracy, in* CONSTITUTIONALISM AND DEMOCRACY 195, 235 (Jon Elster & Rune Slagstad eds., 1988).

19. *Id.* at 239.

pothesize that an oppressed people that have not freed themselves from their oppressors do not develop the strong motives and necessary energy to preserve the bequeathed freedom through the foundational act of constitution-making. John Stuart Mill might have had this in mind when he argued against intervention for the sake of a people's liberation. He insisted upon the principle of self-determination and argued that a people can only enjoy freedom it achieves on its own.[20] However this may be, we must not equate freedom and constitution-making. It is one thing to liberate a people by chasing away its rulers; it is quite a different thing to arrogate the responsibility to give those people a constitution.

This difference does not necessarily mean that constitutions can only come into being through the constituent power of a free people, although this is certainly the ideal case. Mill's opinion reflects the liberal view that nations, similar to individuals, are independent and autonomous actors who are responsible for themselves and should avoid interfering with the affairs of other (individual or collective) persons. This view is supported by contemporary public international law. Article two, paragraph two of the Charter of the United Nations proclaims the sovereign equality of its members as its basic principle, and paragraph four of the same article prohibits the "threat or use of force against the territorial integrity or political independence of any state." Any state interference with the internal affairs of another state is prohibited unless authorized by the U.N. Security Council or justified by the need for self-defense. Arguably this includes interventions on humanitarian grounds to protect a state's population from injustice. At least, this appears to be the prevailing opinion among public international lawyers who regard the domestic affairs of a state, including its constitution, as remaining outside the jurisdiction and evaluation of other states.[21]

But there are other voices, the most prominent being that of the former Secretary-General of the United Nations, Javier Pérez de Cuéllar, who in his annual report to the General Assembly stated:

> [T]he principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is threatened . . . . The case for not impinging on the sovereignty, territorial integrity and political independence of States is by itself indubitably strong. But it would only be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the

20. John Stuart Mill, *A Few Words on Non-Intervention*, *in* 3 DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 154 (Kessinger Publ'g 2004) (1873).

21. *See, e.g.*, Albrecht Randelzhofer, *Introduction Art. 2, Arts. 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 51 (Bruno Simma ed., 2d ed. 2002).

> right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.[22]

Scholars of public international law and practitioners alike have echoed this assessment.[23] Some go a step further and re-conceptualize the idea of sovereignty. They claim that the principle of sovereignty in public international law refers to the sovereignty of the people, not of the state and its elites. According to this view, there is an "emerging right to democratic governance" in public international law[24] which under certain conditions may justify a unilateral armed intervention into the domestic affairs of an undemocratic state; this would be an intervention against political leaders who are not entitled to the protection of the country's sovereignty if their leadership is based upon usurpation.[25] Other authors are more reluctant, not only because they are aware of the looming danger of misuse, but because of the danger in advancing this largely procedural conception of liberal democracy as the genuine model of democracy that could legitimize imposing foreign rule upon non-Western societies.[26] There is an ongoing vibrant discussion of the problem of constitutionalizing public international law.[27]

This discussion reflects the undeniable fact of an increased interdependency of the states increasing the sense of mutual responsibility on a global level.[28] Its implications for constitution-making will be discussed in Part V. It seems appropriate here to discuss one paradigmatic case of importing a constitution, namely the case of West Germany's Basic Law, generated during the period of Allied occupation after World War II.

III. POST-WORLD WAR II GERMANY — NO CASE OF IMPORTED, MUCH LESS IMPOSED, CONSTITUTIONALISM

President Bush used the case of post–World War II Germany, a paradigm for the successful constitutionalization of an occupied country, to justify his administration's attempt to impose an interim constitution on Iraq after the mili-

22. The Secretary-General, *Report of the Secretary-General on the Work of the Organization, 5, delivered to the General Assembly,* U.N.Doc. A/46/1 (Sept. 13, 1991).

23. *See, e.g.*, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, INT'L DEV. RES. CTR., THE RESPONSIBILITY TO PROTECT (2001), http://www.idrc.ca/openebooks/960-7/.

24. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1964); *see also* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law, in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 239, 240 (Gregory H. Fox & Brad R. Roth eds., 2000).

25. *See* Reisman, *supra* note 24, at 248–49.

26. *See* BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 420–25 (1999).

27. Bardo Fassbender, *The Meaning of International Constitutional Law, in* TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 837–51 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 2005).

28. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 23, at 39.

tary defeat of the Saddam regime.[29] In fact, the Basic Law[30] originated in the political will of the Western Allies of World War II who exercised their sovereign power over the country in the decade between May 1945 and May 1955. The Basic Law has become the country's most durable constitution in its admittedly short history as a political nation since 1871. Germany's sovereignty shifted to the occupying powers (United States, Soviet Union, and Great Britain, who co-opted the Gaullist France a few months later) who jointly assumed the responsibility for the country after the unconditional surrender of the military leadership of the Nazi regime on May 8, 1945. Some scholars of public international law argued that the *Reich*, i.e. Germany as a legal and political entity, had foundered as a result of the war and disappeared from the political landscape altogether.[31] However, most authors inside and outside of Germany argued that Germany as a political entity continued to exist, even though it was unable to rule itself because the Four Allies had legally undisputed supreme authority.[32] Under this state of affairs the occupying forces pursued different political goals in their respective zones which they assigned to themselves after the occupation. Ultimately, Germany's division into four occupation zones ended in the split between the "West" and the "Soviet bloc," which dominated world politics until the breakdown of the Berlin Wall on November 9, 1989.

It was this constellation of world politics that gave rise to the project of a separate West German state consisting of the three occupation zones of the Western Allies. To understand how the Basic Law was created, it is necessary to emphasize that despite the ultimate sovereignty of the military commanders in their respective occupation zones, they still had to involve local German forces to establish an administration to provide basic services for the population. This entailed the gradual setting up of German local authorities based upon democratic elections and finally the formation of states (*Länder*) with full-fledged constitutions including bills of fundamental rights and rules about the machinery of government. These *Länder* constitutions were drafted and enacted by democratically elected parliaments; moreover, most of them were submitted to plebiscitary sanction. An integral part of this democratization process had been the licensing of political parties which occasioned a multi-party system from which only the forces of the old Nazi system were excluded. All in all, in 1948, the three Western occupation zones consisted of (at that time twelve) *Länder* which were ruled by parliaments and governments that derived their authority from democratic elections and hence represented the different political forces of the German population. However, in a strictly legal sense the peoples in the *Länder* did not exercise

29. For more on the imposition of the interim constitution in Iraq see Arato, *supra* note 8.

30. West Germany's constitution until 1990 and the united Germany's constitution since October 3, 1990.

31. *E.g.*, Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 518–19 (1945).

32. 1 L.F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 519 (Hersch Lauterpacht ed., 1947).

their constituent power when they enacted constitutions because the supreme authority, i.e. German sovereignty, was "vested, with full effect in International Law, either jointly with the four Powers or with any one of them in respect of the part of German territory placed under its administration."[33]

In July 1948, the three Western Allies submitted a proposal to the prime ministers of the West German *Länder*, suggesting they convene a democratically elected constituent assembly to create a constitution for a West German state consisting of the three Western occupation zones. The new state would be the product of a new constitution. This was an idea which assumed that statehood originated from constitution-making, and that there is no state beyond and prior to the constitution — an assumption which is an inherent element of American constitutional reasoning while it is totally alien to the German constitutional and state law tradition.[34] The German politicians rejected this plan, not because of this theoretical argument, but for a strong political reason founded upon that theoretical argument. They feared that the foundation of a separate West German state would petrify the division of Germany into two states — they correctly anticipated that the Soviet Union would follow suit with the establishment of a distinct state in their military zone — and sanction the final and irrevocable dissolution of the political unity of the German nation.[35]

This refusal of the prime ministers — at that time the only Germans who could claim to be the legitimate representatives not of *the* German people, but of the peoples of the West German *Länder* — created a paradoxical situation: the military commanders held the sovereign power in their military zones and could establish any kind of political regime, both individually in their respective zones and jointly for the three Western zones. The only option excluded from their range of possibilities was to create a constituent assembly of the populations of the German *Länder*. The obstacle was not erected by public international law. Although the then fresh Charter of the United Nations established the right of self-determination of peoples,[36] and arguably entailed new limits to the rights of occupying military forces of a conquering nation, Article 107 of the Charter stipulated certain exceptions at the expense of the "enemy states" Germany and

33. *Id.* at 520. For the German text see Bundesgesetzblatt [Federal Law Gazette] 1990, BGBl. I at 1318.

34. *Cf.* Arthur J. Jacobson & Bernhard Schlink, *Introduction, Constitutional Crisis: The German and the American Experience*, *in* WEIMAR: A JURISPRUDENCE OF CRISIS 1, 1–39 (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

35. For the details see REINHARD MUßGNUG, *Zustandekommen des Grundgesetzes und Entstehen der Bundesrepublik Deutschland*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 219–58 (Josef Isensee & Paul Kirchhof eds., 1987); Michael Stolleis, *Besatzungsherrschaft und Wiederaufbau deutscher Staatlichkeit 1945-1949*, *in* 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 173–217 (Josef Isensee & Paul Kirchhof eds., 1987).

36. *See* Karl Doehring, *Special Section: Self-Determination*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 47–63 (Bruno Simma ed., 2d ed. 2002).

Japan.[37] Rather, the reason has to do with the very concept of constitutionalism. The Western Allies' project was essentially a command to the Germans in the three Western military zones to organize themselves as one people and secede from the German people as it still legally existed in the German Reich.[38] Here again the different conceptual premises of the Germans and, in particular, the Americans came to light. For the American understanding, the will of a multitude to unite under a common constitution is tantamount to creating a nation. Therefore the Americans found nothing wrong in their bid to those Germans who had the chance to live under conditions of freedom, to draw the political consequences, and to constitute themselves as "we the people" who are united under a constitution of freedom. This was not so to the German heads of the *Länder* governments who, it should be emphasized, embodied the then German democratic elite, consisting largely of refugees returned from exile, former prisoners of the Nazi regime, or those who had survived the twelve barbaric years in what later was called the "internal emigration." Even they, whose democratic credentials were beyond any doubt, insisted on the reality of a German people prior to the constitution. For them, a constitution which did not recognize the logical priority of the people as a historical and quasi-existential entity did not fit the needs of the pre-existing German nation. In fact, it could even jeopardize the existence of the nation in that it could encourage tendencies towards the secession of some parts of the country. Thus, it is understandable that the Western Allies' offer to the West Germans to enact a constitution which would solemnly authenticate the freedom which they already enjoyed was resented by many as a severe interference with their democratic freedom. Some had the impression that they were "forced to be free."[39]

The Western Allies could have ordered the convocation of an assembly elected by the population in their zones and assigned it the task of drafting and enacting a constitution. But such a process would not have met the requirements of constitution-making and its power to legitimize the existence and the authority of a polity. Constitution-making demands the constituent power of a collective that defines *itself* as a political entity and disposes of the institutional means to develop and to express its own political will. In other words, constitution-making

37. However, whether these exceptions also apply to the right of self-determination is not fully clear. *Cf.* Goerg Ress, *Article 107, in* 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY ¶ 8 (Bruno Simma ed., 2d ed. 2002).

38. Which, as noted, had survived as a legal entity but was unable to form a collective will.

39. This is Rousseau's notorious and seemingly paradoxical statement from JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 64 (Maurice Cranston trans., Penguin Books 1968) (1762). Note, however, that Rousseau's contention was not paradoxical at all. He referred to a person who had agreed to enter the social contract and committed himself to accept the burdens and the benefits of the contract, the essential benefit being the freedom of the individual. Hence to force someone to be free was just a somewhat pointed version of the truism that a contract into which I have entered voluntarily can be coercively enforced against me.

is an act of political *self*-determination.[40] While public international law did not prevent the Allies from imposing their rule upon the German people, they could not create the legal and political effects of a constituent power by their sovereign *fiat*.

Perhaps the Western Allies were acknowledging the limits of their sovereignty when they finally abstained from pursuing their project of an imposed German constituent assembly. In any case, a compromise was reached that established a Parliamentary Council consisting of delegates elected by the West German *Länder*. The Parliamentary Council represented the plurality of the political forces of the peoples in the *Länder* — not of "the people" of the three Western occupation zones, nor of "the people" of the new would-be West German state, nor much less of "the German people" as it latently still existed in the persisting "Germany as a whole" (a term which had replaced the German *Reich*). The Parliamentary Council (composed of political party representatives including the two deputies of the Communist Party) wanted to maintain the unity of the German nation, so they created the West German state under the name "Federal Republic of Germany" as a transitory and intentionally short-lived political body which was to serve as a stand-in and to act for the momentarily incapacitated German nation (i.e. the people of the German *Reich*). This is also the main reason why the Parliamentary Council did not call their creation a "constitution," but rather "Basic Law for the Federal Republic of Germany," which they did not submit to plebiscitary approval. Thus, the majority of its members could accept the "stain" that the Western Allies reserved the right to veto stipulations of the draft document and to give their final authorization. It was only after this sanction through the sovereign that the draft constitution was submitted to the parliaments of the *Länder* for approval. Only the parliament of Bavaria refused to consent, but that had no tangible consequences. Since the new entity was not devised as a federation but as a federal state,[41] the unanimous consent of all *Länder* was not required for the validation of the constitution. Having passed this complex procedure, the Basic Law was solemnly proclaimed on May 23, 1949.

Was the Basic Law an imposed constitution? And if so, was the imposition legally justified? By today's standard of the right to self-determination[42] it was certainly imposed. Bearers of this right are not only ethnic minorities living in an ethnically different state but also peoples who live on the territory of a state[43]

40. *See* PREUSS, *supra* note 3; Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639, 639 (1993).

41. *See generally* MURRAY FORSYTH, UNIONS OF STATES: THE THEORY AND PRACTICE OF CONFEDERATION (1981).

42. U.N. Charter art. 1, para. 2; U.N. International Covenant on Civil and Political Rights art. 1, para. 1; U.N. International Covenant on Economic, Social, and Cultural Rights, art. 1, para. 1.

43. *See* Doehring, *supra* note 36, at 55–56.

— this was the case with the Germans whose territory was conquered by the Allies, but not annexed. In other words, they had not become the subjects of another state. The right of self-determination includes the people's freedom to decide on its form of government without external intervention. The Allies' influence on the content of the Basic Law and their right to authorize its enactment by the Parliamentary Council restrained the Germans' freedom to decide about the particular character of their government. This is of course not to say that this restraint was illegal — as indicated above, the then valid international law did not forbid the assumption of the supreme authority of the country and, consequently, the establishment of a new political and administrative order for an entity which was not supposed to be a fully sovereign state.

Apart from this somewhat formalistic account, there is a substantive criterion to judge the role the Western Allies played in the making of the German Basic Law. Democratically elected Germans drafted the Basic Law, it had been approved by all but one *Länder* parliaments, and even the Bavarian *Landtag* which refused consent did not want a completely different structure of the constitution, merely a stronger federal setup. Moreover, the rules of the Basic Law opened a range of democratic freedoms and provided instruments of democratic self-determination which were by no means inferior to those afforded by the Weimar constitution which had been created by the constituent power of the German people.[44] Thus, the people of the Federal Republic of Germany were not forced to live under rules which they rejected. The only "blemish" of the Basic Law was its lack of plebiscitary sanction: No constituent assembly had been elected, nor had the result of the deliberations of the Parliamentary Council been submitted to plebiscitary approval.[45]

National unity was the only issue where the political aspirations of the Germans living in the Federal Republic collided with the (original) political purposes of the Allies: Had the Allies forced them to create a new state and to accept it as the final palladium of their political identity this would have been tantamount to the imposition of a foreign political will. This, however, did not occur. On the contrary, Western Allies accepted the formula of the preamble of the Basic Law in which an explicit reference was made to the "German people" and its constituent power. Moreover, the final article gave emphasis to the purely transitory character of the Federal Republic and its Basic Law.

When the Federal Republic became sovereign in May 1955, no political force demanded a new constitution, opting instead for national unity in one German national state as they did in 1949. But even after the fall of the Berlin Wall and the accession of the (formerly communist) German Democratic Republic to the Federal Republic in October 1990, the constituent power of the now united

44. *See* CHRISTOPH GUSY, DIE WEIMARER REICHSVERFASSUNG (1997); 4 E.R. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789 (1981).

45. *See* MERKL, *supra* note 9, at 55, 128–29, 176, 181.

German people was invoked only by politically marginal groups in the two German states. As a result, Germany lives under a constitution which was initiated by occupation powers who assumed sovereign power over the German people and devised for a non-sovereign political entity. The constitution was never approved by the constituent power of the German people, but is accepted as perfectly legitimate by the great majority of the German people. In the German case, the process of constitution-making seems to have inserted less legitimacy into the Basic Law than the crucial role of the constituent power in constitutional theory presupposes.[46]

Still, there is no reason to dismiss the significance of the process of constitution-making. Had the Allies insisted on their original project and forced the (West) Germans to create a constitution through a constituent assembly and/or plebiscitary approval in a referendum, the outcome could have been resented by the Germans as a foreign project which lacked sufficient legitimacy. This could have undermined the force of the constitution irrespective of its presumably acceptable substance. On the other hand, the proper process is only a necessary, not a sufficient condition. A polity is likely to view a constitution as illegitimate if its substantive stipulations do not fit in the context of that polity; after all, the constitution is not, as some claim, a suicide pact. Even the most appropriate and legitimacy-engendering process will ultimately not be strong enough to save a constitution if its rules and principles do not satisfy the needs of the country. The Weimar constitution is a sad example for this truth.

The reference to the Weimar constitution gives rise to an observation which will eventually lead to the reflections in the third part of this essay. In many instances the Basic Law has been drafted by its authors as an attempt to avoid the mistakes and insufficiencies of the Weimar constitution, which they attributed to be part of the cause of the collapse of the Weimar Republic. Thus, to give just a few examples, they put the bill of fundamental rights on top of the Basic Law and made it the binding normative guideline for the conduct of public authorities on the federal, state, and local levels; they avoided even the least plebiscitary elements which played a certain, if largely overestimated role in the Weimar Republic; they loosened the dependency of the executive from the political will of the parliament, making a vote of no confidence extremely difficult and thus establishing a strongly executive-biased system of government; and they eliminated the possibility of the eradication of democracy through democratic means by establishing a so-called eternity clause (Article 79, paragraph 3) which excluded certain basic principles of the constitution from any kind of constitutional

46. *Cf. Introduction* to THE PARADOX OF CONSTITUTIONALISM, *supra* note 2. For the German case see Christoph Möllers, *We are (afraid of) the People: Constituent Power in German Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM, *supra* note 2.

amendment. More or less they established a type of "militant democracy," devised and strongly recommended by Karl Loewenstein in the 1930s.[47]

Regardless of the Weimar constitution's failures,[48] the relevant point is that the Basic Law was created by a long and protracted constitutional discourse over the requirements of a modern constitution that would be able to meet the challenges of a new age — the age of mass democracy dealing with the severe socio-economic conflicts of a class-cleaved society without abandoning the basic principles of constitutionalism that had been developed at the end of the 18th century. In Germany this debate began before the end of World War I and the creation of the Weimar constitution in 1919. It mushroomed after the establishment of the Weimar Republic and was accompanied by an overall sense of deep political and cultural crisis.[49] In other words, the German constitutional discourse of the 20th century was based upon a deep and painful experience and understanding of the fragility and vulnerability of the civilizing capacity of constitutions to such a degree, that the term "imposition" for the depiction of the involvement of the three Western Allies in the creation of the Basic Law appears inappropriate in the first place. The level of reflexivity about the risks of a failed constitution and about the embeddedness of constitutions in suitable pre-constitutional contexts was so high on both sides that it seems more fitting to describe the achievement of the Basic Law as a mutual learning process.[50]

IV. PRECONDITIONS OF SUCCESSFUL CONSTITUTION MAKING

Looking at the contextual character of constitutions reveals the requisite preconditions for constitutions to function as a means of civilizing the political life of a country. Of course, it is impossible to give an exhaustive account. In view of the increasing occurrence of weak and failing states, this discussion is limited to two conditions which seem particularly relevant to this topic: the first is statehood and secularization, and the second is ethnic and religious homogeneity.

The German case was a unique historical occurrence, but also a link in a chain of events which resulted in the transition from authoritarian rule to democracy. These transitions include the wave of democratization after World War II (Germany, Italy, Japan, Austria), followed by the regime changes in the Medi-

47. Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV 638 (1937).

48. *Cf.* CHRISTPOPH GUSY, WEIMAR — DIE WEHRLOSE REPUBLIK? VERFASSUNGSSCHUTZRECHT UND VERFASSUNGSSCHUTZ IN DER WEIMARER REPUBLIK (1991); WEIMARS LANGE SCHATTEN — "WEIMAR" ALS ARGUMENT NACH 1945 (Christoph Gusy ed., 2003).

49. *See* Jacobson & Schlink, *supra* note 34.

50. This dimension of constitution-making has been introduced by Andrew Arato, *Constitutional Learning*, 52 THEORIA 1 (2005); *see also* PREUSS, *supra* note 3.

terranean area and in Latin America between 1974 to 1985 (Greece, Portugal, Spain, Brazil, Uruguay, and Argentina), and the transformation of Central and Eastern European countries from communist rule to some kind of constitutionalism.[51] These experiences caused quite different, country-specific patterns of constitutionalization. All of them assumed that the receiving countries kept certain basic institutional and cultural conditions which somehow were attuned to constitutionalism. This assumption has become doubtful. The contemporary debates about importing or imposing constitutions deal with countries which have only a weak if any constitutional history. This applies to most of the Arabic nations. The compatibility of their political culture with constitutionalism is doubtful at best. This matter should be further researched and explored using cultural and area studies. Scholars of constitutionalism can contribute to this research by analyzing the pre-constitutional conditions of constitutionalism. Is the idea of constitutionalism less universal than its essential message suggests? Two elements appear particularly problematic in this respect.

A. Statehood and Secularization

The history of modern constitutionalism is strongly connected with the development of statehood, its bureaucracy, territorial character, policing and military, diplomatic capabilities, etc.[52] After all, constitutionalism was an important tool of rationalizing state power.[53] Although the modern state originates in the European history and culture,[54] it has become the universal political form of the 20th century. Its essential elements — territoriality, sovereignty, coercive control of the population living within the boundaries of the territory[55] — do not seem overly demanding and hence are conducive to every geographical and cultural environment. In an age when weak and failed states come ever more to the surface[56] this assumption is no longer certain.[57]

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51. *See* ELSTER ET AL., *supra* note 5, at 4 (describing the several waves of democratization); Renske Doorenspleet, *Reassessing the Three Waves of Democratization*, 52 WORLD POL. 384, 384–406 (2000).

52. *See, e.g.*, CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA (Blaisdell Publ'g Co. 1968) (1937); THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE: STUDIES IN POLITICAL DEVELOPMENT (Charles Tilly ed., 1975); MARTIN VAN CREVALD, THE RISE AND DECLINE OF THE STATE (1999); WOLFGANG REINHARD, GESCHICHTE DER STAATSGEWALT: EINE VERGLEICHENDE VERFASSUNGSGESCHICHTE EUROPAS VON DEN ANFÄNGEN BIS ZUR GEGENWART (1999).

53. DIETER GRIMM, DER VERFASSUNGSBEGRIFF IN HISTORISCHER ENTWICKLUNG: DIE ZUKUNFT DER VERFASSUNG 101–55 (1991).

54. GIANFRANCO POGGI, THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS 34 (1990).

55. *See id.* at 19. See also the famous juristic definition of GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 183, 394 (Darmstadt 3d ed. 1960) (1900).

56. *See* ROBERT I. ROTBERG, WHEN STATES FAIL: CAUSES AND CONSEQUENCES (2004).

57. For the prospects of statehood in the extra-European world see REINHARD, *supra* note 52, at 480.

If we look at the post-communist societies of Eastern and Central Europe including Russia, we realize that the institutional devices of a modern constitutional state have been established. This holds true for those countries which, on May 1, 2004, acceded to the European Union; this was only possible after a difficult process of assimilating to the economic and political structures of the European Union, laid down in the "Copenhagen Criteria" of the Treaty on the European Union.[58] However, what is prevailing in some countries, Poland for example,[59] is a deep disappointment with the new political system's capacity to cope with the economic and social problems of an order which they had passionately yearned for under communist rule. Indeed, in these countries the life situations of many ordinary people have dramatically deteriorated under the auspices of the new political order. What is even more serious is that the new political structures of the constitutional state rarely generate the degree of political stability which seems necessary for the reconstruction of the economy, particularly for attracting foreign investors. Evidently, the formal institutions of the constitutional state are a necessary but not a sufficient condition for satisfactory state functioning. If this holds true, the question arises as to which additional preconditions are required for the smooth operation of the constitutional state.

There is one requirement which is for the most part undisputed, namely the constitutional state must be a *state* in the modern sense of this term. It must be a political organization which monopolizes the authority to wield legitimate coercion, including physical force, thus placing all individuals equally under its power, outlawing any kind of self-help or self-justice and prohibiting any kind of intermediary force which could either claim loyalty from its members, or accumulate so much power that it could become a competitor to the state. Max Weber established the classical definition for the modern state as "a compulsory organization with a territorial basis. Furthermore, today, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it,"[60] and, elsewhere today, "legal coercion by violence is the monopoly of the state."[61]

There is good reason to highlight the state's monopoly of legal coercion. Today we experience a serious malfunction of constitutions whenever this requirement is not satisfied. The aforementioned category of failed states which has become a major problem of international politics[62] is unequivocal evidence for the renaissance of a phenomenon of the past, namely unconsolidated statehood. This results in unsettled disputes about territorial boundaries, about nationality and

58. Consolidated version of the Treaty on European Union, art. 49, O.J. C 325/5, at 31 (2002), 37 I.L.M. 67, at 78 (ex Article O).

59. Let alone those which have not (yet) joined the European Union or will not be able to join it.

60. MAX WEBER, ECONOMY AND SOCIETY 56 (Guenther Roth & Claus Wittich eds., University of California Press 1978) (1968).

61. *Id.* at 314.

62. *See generally* MARY KALDOR, NEW & OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (1999).

citizenship, and about the principles and forms of government, including the struggle about who is entitled to rule. The formation of the modern state in Western Europe — its territorial basis, its monopoly of legal coercion, its compulsory jurisdiction about all actions taking place in the boundaries of its territory, and its continuous operation — was the result of long and cruel religious and civil wars in the 16th and 17th centuries in which the different religious denominations, churches, and sects not only struggled for the right religious doctrine, but for the imposition of their respective religious truths upon all members of the society. The connection of religious truth with political authority was one of the inexhaustible sources for civil war in 16th- and 17th-centuries-Europe.

In the history of political ideas it was obviously Thomas Hobbes' concept of a political order which provided a way out of the never-ending struggle for religious truth and metaphysical certainty. For him, the inherent rationale of a good polity consisted in its capacity to preserve peace and to prevent civil war. Satisfying the basic human need for physical security and lessening fear of a violent death was more important than the concern for eternal life and salvation which had dominated political reasoning during the Christian period of European history.[63] In other words, Hobbes removed religion as a source for rules about the character of a polity and thus opened a new area of reasoning about the appropriate structure of the polity — one may call this the sociological turn in the justification of political rule.

The concept of sovereign state power and the state's monopoly of legitimate coercion, then, is the immediate result of a secular justification of the polity. It resulted from the emergence of a world that lost its common religious fundaments and the economic basis of the feudal communal life as well. The European world of the 17th century fell apart, and the universalism of the Catholic world was replaced by the plurality of subjective world views of individuals, groups, sects, new social entities, etc. How could one conceive of an order which was able to bind the individuals together, i.e. which was able to prevent civil war among them, without imposing on them a common social and cultural form of life which had lost its cohesive force?

This predicament of the European world of the 17th century was the starting point for the career of a completely new theoretical paradigm, namely the paradigm of interest. As Albert O. Hirschman has thoroughly analyzed,[64] the rationality, calculability and hence predictability of the interest — as opposed to the irrationality and unpredictability of the passions — became the key concept for understanding the world and the legitimation of individuals' actions since the 17th century. To struggle for wealth, which had been disqualified as a sin by the Catholic church for centuries, now received an increasingly positive coloring, un-

63. THOMAS HOBBES, LEVIATHAN 104–09 (Bobbs-Merrill Educ. Publ'g 1978) (1651).

64. *See* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1978).

til, finally, it was praised as a virtue. The most drastic theorist of the interest as the basis of all social actions was of course Thomas Hobbes, for whom the interest of the individual in his or her self-preservation was the only valid criterion for the legitimacy of his or her actions. Consequently, he became the most radical advocate of the sovereignty of the state and its monopoly of legitimate coercion. For him the undisputed authority of the state to keep peace and order was the only means to satisfy the individuals' interest in their self-preservation. In order to fulfill this task, the sovereign even had the right to determine the religious and the epistemological truth which his subjects had to believe in because, in Hobbes' view, it was primarily the quarrel about the right religion which had led the people to argue and fight with each other, and ultimately to violate peace and order and engage in civil war.[65]

In a nutshell, the genesis of the modern state, its monopoly of legitimate coercion, and its legitimation as an order which is specialized in the maintenance of peace and order in the external world is due to a process of secularization.[66] Perhaps it is more correct to speak of a process of continuous domestication of the religious energies of the European societies since the 17th century. In the perspective of political and constitutional theory, the relations between church and state were, of course, particularly important. There have been different answers to this problem — reaching from the concept of a state church, predominant in Germany until the 19th century and still valid in contemporary England, up to the most radical separation of church and state in the establishment clause of the First Amendment of the U.S. Constitution — all of which are anxious to safeguard the integrity of a sphere of politics, civil liberty and political obligation where the commands of the church have no legally binding character. Given the plurality of religious and value orientations in modern societies it is not surprising that the injection of particularly religious commands into the secular legal order — for example the prohibition of divorce, the unconditional prohibition of abortion, or the denial of equal rights to women — normally tends to weaken the binding character of the legal order. Its strength and legitimacy rests on the strict separation of morality and legality, and this implies that it does not make any claim on the moral or religious beliefs of its citizens.

B. Ethnic and Religious Homogeneity as Preconditions of the Constitutional State?

This last issue leads to a second condition which seems indispensable to the viability of a constitutional order. This is the capacity of a society to cope with its internal conflicts without resorting to civil war. Of course, one may say that a

65. *See* HOBBES, *supra* note 63, at 147.

66. *See* HERBERT KRÜGER, ALLGEMEINE STAATSLEHRE 32 (1964); A.D. LINDSAY, THE MODERN DEMOCRATIC STATE 64–65 (1947); Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, *in* STAAT, GESELLSCHAFT, FREIHEIT 92 (1967).

main feature of constitutions is that they preclude civil war and society's relapse into an uncivilized mode of existence, i.e. a Hobbesian state of nature. However, the fate of the Weimar constitution clearly displays that sometimes a constitution is not strong enough to stand firm against the power of forces which are hostile against its intellectual and moral foundations. Constitutions are about proper institutions which guarantee a sphere of free, spontaneous, and autonomous interactions among the members of what we call civil society, and about the procedures through which civil society is able to constitute itself as a polity and to develop a collective will. These two pillars of modern constitutionalism presuppose that neither civil society nor the polity are homogeneous consensus-based social entities, but rather consist of individuals pursuing a plurality of competing, mutually exclusive values and interests which have to be harmonized. In other words, constitutions are institutional devices which aim at making compatible the economic, social, and cultural plurality of a "society of individuals."[67] This entails that they are specialized in coping with conflicts arising among members of the society, related to various issues, ranging from the proper delineation of boundaries in the political vis-à-vis the sphere of civil society through the principles of social justice, to the definition of guidelines for collective action like the "national interest." They are conflicts about what it means to live together, in one polity, under a constitution.

Paradoxically it is this permanent struggle for the definition of the common good which generates a spirit of community in a society of individuals — at least this is the assumption of authors who claim that conflicts have a positive effect upon the social coherence of societies.[68] In a critical analysis of this time-honored line of argument in the social sciences, Albert O. Hirschman offers an important qualification which is relevant to this article. In his view, not all conflicts further coherence in all kinds of societies; rather, he claims, social conflicts have only positive effects in democratic market societies, and even this may be true only for a certain genre of conflicts. In developing his argument he writes:

> Many conflicts of market society are over the distribution of the social product among different classes, sectors, or regions. Highly varied though they are, they tend to be divisible; they are conflicts over getting more or less, in contrast to conflicts of the either-or, nondivisible category that are characteristic of societies split along rival ethnic, linguistic, or religious lines. Nondivisible conflicts have recently also become more prominent in the older democracies and particularly in the United

67. *See* NORBERT ELIAS, THE SOCIETY OF INDIVIDUALS 3–66 (Michael Schröter ed., Edmund Jephcott trans., 1991).

68. For an overview of the literature see Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Societies*, *in* A PROPENSITY TO SELF-SUBVERSION 231, 236 (1995).

> States, as a result of the importance assumed by such issues as abortion and by problems arising out of multiculturalism.[69]

Hirschman's reference to the United States — the oldest constitutional state — gives rise to the question of whether any attempt to import a constitution into a conflicted country is doomed to failure. Here, again, it seems appropriate to remind us that the idea of homogeneity has frequently been invoked as a necessary element of the modern constitutional state — authors of the liberal and left spectrum tended to emphasize socio-economic homogeneity,[70] while in the more conservative field the idea of national, ethnic, or religious homogeneity prevailed.[71] Today it is the latter dimension of homogeneity which arouses concern because it refers to national, ethnic, and religious conflicts which appear irreconcilable in many regions of the world and which in several cases have assumed the character of international crisis (e.g. conflicts in Congo, Sri Lanka, or Chechnya). What comes to the fore in these conflicts is the quest for commonness, or sameness as the pre-political foundation of a polity. As stated above, in Europe the religious conflict between the several Christian confessions, denominations, and sects was domesticated by the establishment of sovereign statehood, and in the United States the separation of religion and politics has become one of the fundamentals of its constitutional system.[72] Thus, religion has never been a viable candidate as a pre-constitutional groundwork of the constitutional state.

But something like a secular religion has had an important influence at least upon the European version of the constitutional state, namely the nation. In its historical development over the last two-hundred years, nationality, or nationhood, has turned out to be the most vigorous concept of commonness. Max Weber's observations on the constitutive character of nationality and ethnicity for the self-understanding of political communities are surprisingly up-to-date. But he, too, fails to fully explain the predominant "connotation that whatever is felt to be distinctively common must derive from common descent," although, as he notes, in reality "persons who consider themselves members of the same nationality are often much less related by common descent than are persons belonging to different and hostile nationalities."[73] From this point of view, nationhood or nationality constitutes an antecedant community which appears able to create that kind of commonness and pre-political social solidarity required for the functioning of a polity based upon a society of individuals.

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69. *Id.* at 244.

70. *See* OTTO KIRCHHEIMER, POLITICS, LAW, AND SOCIAL CHANGE: SELECTED ESSAYS 40 (1969).

71. *See, e.g.*, CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY 9 (1985).

72. *See* HAROLD JOSEPH BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 221–35 (1993).

73. *See* WEBER, *supra* note 60, at 395.

Note, however, that since the end of the 18th century two different concepts of nation have been competing for recognition. On the one hand, there is the French concept of nation according to which, in the famous words of the Abbe Sieyès, a nation is "[a] body of associates living under *common* laws and are represented by the same *legislative assembly*."[74] In this understanding, the nation is constituted by the entirety of the denizens of a particular territory who, by the very act of forming a political entity and of being subject to common laws, acquire the status of citizenship and constitute the demos.[75] This political concept of nation diverges significantly from a concept that has been prevailing in Germany and in Eastern Europe since the end of the 18th century: the nation as a pre-political community constituted by the commonness of such ascriptive properties as origin, race, language, religion, culture, history, and the like. Here the nation is not the demos, but the ethnos.[76] It is this ethnic definition of nationhood which is an almost insurmountable obstacle to the inclusion of individuals in the nation who do not meet the terms of ethnicity as defined by the group which dominates the country. Ethnic plurality is largely regarded as spoiling the integrity of the political community — the end goal being ethnic identity and authenticity. The ultimate criterion of justice is not the universalist standard of what is right for all human beings, but what is good "for us." Hence pluralist democracy which represents the universalist values of modern constitutionalism is barely compatible with political forces which aspire to an ethnically homogeneous polity.

A further aspect of constitutionalism seems relevant here. One of the core principles of constitutionalism is the limitation of political power.[77] This is coherent with the idea of an autonomous civil society which, due to its inherent plurality of ideas and interests, develops a high degree of creativity and innovation which is a driving force of the idea of progress associated with the idea of constitutionalism.[78] This is difficult to reconcile with ethnic identity as a pivotal idea of a polity. In fact, as Weber wrote in view of the conflicts within the multinational empire of the Hapsburgs:

> [T]he concept "nation" directs us to political power. Hence, the concept seems to refer . . . to a specific kind of pathos which is linked to the idea of a powerful political community of people who share a common language, or religion, or common customs, or political memories; such a

74. EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 58 (S.E. Finer ed., M. Blondel trans., Frederick A. Praeger 1963) (1789).

75. *See* ERIC J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 14–45 (1990).

76. *See* E.K. FRANCIS, INTERETHNIC RELATIONS: AN ESSAY IN SOCIOLOGICAL THEORY 43–115 (1976).

77. *See* KARL JOACHIM FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON (1974); ANDRÉS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (1999).

78. *See* PREUSS, *supra* note 3.

> state may already exist or it may be desired. The more power is emphasized, the closer appears to be the link between nation and state. This pathetic pride in the power of one's own community, or this longing for it, may be much more widespread in relatively small language groups such as the Hungarians, Czechs or Greeks than in a similar but much larger community such as the Germans 150 years ago . . . .[79]

Perhaps Weber's observation is still valid today. The Balkan Wars of the 1990s come to mind. There are indications today that the pride of the power of one's own community also feeds the idea of an ethnic understanding of the nation and vice versa. If this hypothesis holds true it would mean that implanting constitutions in divided societies, in which the groups struggling for power define their vision of a good polity in ethnic terms, appears to be a particularly difficult if not entirely fruitless undertaking. Constitutionalism requires a polity whose members are citizens, not brothers/sisters or otherwise bound together by pre-political and pre-legal "ascriptive" attributes, who are aliens to each other and yet are able to recognize each others as equals.[80]

A final remark as to the issue of religion. As stated above, in the Western tradition of constitutionalism, religion was not a serious candidate for forming the pre-political community of the constitutional state because modern statehood rested upon the political and legal isolation of religion from politics. Here a qualification seems appropriate. Today we observe signs of a renaissance of conflicts between religion and politics on a worldwide level. Against many predictions, religious conflicts are not restricted to premodern societies;[81] they cannot be understood as pure modernization conflicts, they are also conflicts of modern societies. Also, in the secularized world of today, religious issues create deep political tensions in many constitutional states. After all, Northern Ireland has been living on the verge of a religious civil war for over twenty-five years. There are other cases of deep politico-religious tensions which need political accommodation and constitutional solution, for instance the recent French debate (and legislation!) about the right of Muslim women to wear the scarf in public institutions (like schools or universities), a debate which in a different version has also reached Germany.[82] Other examples of political and, consequently, constitutional disputes in advanced modern societies are the well-known battles in Germany

79. WEBER, *supra* note 60, at 398.

80. *See* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); PETER RIESENBERG, CITIZENSHIP IN THE WESTERN TRADITION: PLATO TO ROUSSEAU (1992); Ulrich K. Preuss, *Citizenship and Identity: Aspects of a Political Theory of Citizenship*, *in* DEMOCRACY AND CONSTITUTIONAL CULTURE IN THE UNION OF EUROPE 107 (Richard Bellamy et al. eds., 1995).

81. *See generally* Peter Beyer, *Globalizing Systems, Global Cultural Models and Religion(s)*, 13 INT'L SOC. 79 (1998); Ronald Inglehart & Wayne E. Baker, *Modernization, Cultural Change, and the Persistence of Traditional Values*, 65 AM. SOC. REV. 19 (2000).

82. See the decision of the Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282 (F.R.G.), *available at* http://

and in the United States, respectively, about school prayers, about displaying religious symbols like the crucifix in public schools, or about religious instruction.

Until the middle of the 20th century, constitutionalism was mainly a Euro-Atlantic concept and political practice, and therefore constitutionalism dealt primarily with the conflicts which resulted from the confessional splits within Christianity. Two major developments have changed this situation. First, Christianity no longer defines the framework of religious conflicts, not even in traditionally Christian European and U.S. societies. They have undergone profound transformations to multiethnic, multireligious, and multicultural societies which comprise communities of all major world religions including the increasing group of atheists. Second, constitutionalism is no longer an exclusively Euro-Atlantic concept. At the end of the 20th century constitutionalism has become a universal yardstick for civilized governance. Yet the assumption that the Euro-Atlantic experience with the role of constitutionalism in the containment of religious conflicts may serve as a model for other regions is obviously premature. As stated above, the Euro-Atlantic experience was restricted to the confessional conflicts within Christianity; it has been ignorant with respect to conflicts between different religions. There were no Muslim communities in the early modern world of Europe which engendered constitutionalism, much less other non-Christian religious communities with the exception of the Jews. But the members of this religious minority were almost everywhere victims of persecution or severe discrimination despite the principle of toleration which eventually developed into the constitutional right to religious freedom.[83] Thus, the tradition of constitutionalism — Euro-Atlantic in essence — does not provide answers for the religious conflicts of the 21st century. In view of the aforementioned difficulties of the multireligious and multicultural Western societies to cope with their present-day problems of integrating religious energies into their concept of governance, it is questionable whether they are in the position to offer convincing solutions for other regions of the world which are deeply divided on religious issues.

This does not mean, of course, that deeply divided societies cannot learn from the Euro-Atlantic constitutional experience. Nor should we dismiss projects of constitutionalizing conflict-ridden societies as intrinsically futile. There are approaches to establishing post-conflict constitutionalism which seem more promising than a mere imposition of constitutions after a coerced regime change. Post–World War II Europe is an example for rising above never-ending and bloody conflicts of the past through the creation of new forms of interdependency among the former enemies. The European Union of today, having evolved from the incipient European Economic Community of 1957, has become the most ad-

www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html (German), http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html (English).

83. PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 7–13, 54, 293 (2003).

vanced model of mutual interdependence of nation-states. This has generated a new type of composite constitution in which the legal orders of the supranational European Union and of the member states complement each other to the effect that none of them can claim the status of autonomy.[84] There are indications that the involvement of external actors may become a general pattern of constitution-making world wide.

V. THE INFLUENCE OF INTERNATIONAL LAW UPON THE CONSTITUTIONALIZATION OF CONFLICT-RIDDEN SOCIETIES — INTERNATIONAL "CONSTITUTIONAL INTERVENTION"

The international community has increased its role in the creation of constitutions, especially in fragile states. The analysis of the structures of governance in the 21st century can no longer presuppose the time-honored distinction between inside and outside the state, that is, clear-cut boundaries between the national and the international spheres. Both the spheres of sovereign statehood and of inter-state relations have lost their distinct characteristics and have undergone a process of profound transformation. This process is, to put it succinctly, an evolution from a "pluriverse-of-states order" into what one might call, paraphrasing Ulrich Beck, a "transnational cooperative order."[85] The former, formally recognized in the Peace Treaties of Westphalia, was a design of spatial differentiation of the politically relevant parts of the globe into a pluriversum of sovereign states. This new spatial order became the model for the social and political organization of the modern world, in that it created and established new patterns of interaction and spatial ontologies.[86] The most important was, of course, the distinction between inside/outside,[87] making boundaries between territories "meaningful dividers between social, economic, and cultural systems."[88]

Obviously, today this spatial order no longer exists. The porosity of state boundaries, the diminished relevance of state territory, and the decreasing control of the states' authority over the life world of their population have created a global space in which the decision-making power is no longer distributed along the lines of state borders. In the developing world of globalization new modes of governance have emerged. In the international sphere they include policy-net-

84. Ingolf Pernice, *Multi-Level Constitutionalism in the European Union*, 27 EUR. L. REV. 511 (2002); Ulrich K. Preuss, *Prospects of a Constitution for Europe*, 3 CONSTELLATIONS 209 (1996); J.H.H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 INT'L J. CONST. L. 173, 176 (2005).

85. ULRICH BECK, WHAT IS GLOBALIZATION? 133, 135 (2000).

86. ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY (1986).

87. R.B.J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY (1993).

88. Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, *in* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 81, 90 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

works of state agencies, NGOs, transnational corporations, law firms, and international organizations, as well as multi-level arrangements of governance using complex methods of cooperation and consociational procedures at different geographical and functional levels.[89] The states' autonomy and their claim to monopolize the power and the authority to determine the character and the quality of public goods for their polities have greatly decreased, as they have become entangled in those tight networks of public goods production.

Unsurprisingly this has also had considerable effects upon the role of constitutions. No longer can we regard them as purely domestic instruments of government of a nation-bound population which exercises its right to national self-determination without concern of its regional or global surroundings. Even in the United States, the seemingly most self-sufficient global power, a vivid debate has developed about the question of whether the courts are allowed to refer to foreign law when they adjudicate a national case.[90] There are other states which are much more exposed to external influence than the United States. Obviously I refer to the increasing number of states which simply do not dispose of the indispensable institutional requirements of statehood, the most important being undisputed territorial boundaries, the state's monopoly of coercive power, and a minimal apparatus of law enforcement built upon basic forms of the rule of law. This sad predicament is usually the consequence of unresolved domestic conflicts frequently triggering civil war. It is this category of the above-mentioned failed states which is highly dependent upon the support of the international community. While, of course, the aid of material goods like food, health care, and basic physical infrastructure are of utmost importance, good internal governance is at least as important for the sustainable development of those countries.

The relationship between a country's commitment to the rule of law and the respect of human rights and its material welfare, has been convincingly shown by the research of economists, most prominently by Amartya Sen.[91] Similarly, the then Secretary-General of the U.N., Boutros-Ghali, in his June 17, 1992 report to the Security Council, *Agenda for Peace*, drew his audience's attention to the "obvious connection between democratic practices — such as the rule of law and transparency in decision-making — and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communi-

89. See the selection of an abundant literature in THE GLOBAL TRANSFORMATIONS READER (David Held & Anthony McGrew eds., 2003); GLOBALIZATION: THEORY AND PRACTICE (Eleonore Kofman & Gillian Youngs eds., 2d ed. 2003).

90. I refer to the debate following *Roper v. Simmons*, 543 U.S. 551 (2005).

91. *See, e.g.*, AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (Oxford University Press 1983) (1981).

ties."[92] He urged the leaders of States "to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[93] Although the *Agenda for Peace* does not explicitly mention the issues of state-building and constitution-making, it certainly became an important founding document for the several activities of the U.N. in this area of international politics.[94]

Thus, the concern for the constitutional character of a country has become an important element of international politics. Recently Daniel Thürer, the Swiss scholar of public international law, has explored the international influence upon national processes of constitution-making and discovered different roles of the international community which includes manifold non-state actors. These modes of involvement in the constitutional affairs of a country range from initiating through accompanying and steering, to the instatement of such processes.[95] We may call this kind of international aid "constitutional intervention," using the analogy to the established term "humanitarian intervention." To be sure, while the latter includes military means, the former is thoroughly civil in character.

An embryonic form of this type of U.N. "intervention" dates back to 1984 when the U.N. Security Council closely watched the constitutional development of South Africa and its apartheid system. In its Resolution 554 (Aug. 17, 1984) it declared the "new" constitution which the regime had enacted in 1983 "as null and void." This resolution was a precursor of a development which, after the end of the Cold War and the emergence of thoroughly new constellations in international politics, became a pattern of international governance. Although taking account of the specific character of the conflicts and of their underlying conditions in the relevant countries, the general line of action of the U.N. is the establishment of an International Interim Authority (occasionally under the authority of Chapter VII of the U.N. Charter), the explicit recognition of the sovereignty, independence, territorial integrity and national unity of the relevant country, and the appeal to all parties involved in the conflict to cooperate with the Interim Authority with the aim to reach a reconciliatory settlement.[96]

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92. The Secretary-General, *An Agenda for Peace Preventative Diplomacy, Peacemaking and Peace-Keeping*, ¶ 59, *delivered to the Members of the United Nations*, U.N. Doc. A/47/277, S/24111 (June 17, 1992), *available at* http://www.un.org/Docs/SG/agpeace.html.

93. *Id.* at ¶ 17.

94. *See* RICHARD CAPLAN, INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION (2005); SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING (2004).

95. 1 DANIEL THÜRER, KOSMOPOLITISCHES STAATSRECHT: GRUNDIDEE GERECHTIGKEIT 3–39 (2005).

96. *See, e.g.*, S.C. Res. 1589, U.N. Doc. S/RES/1589 (Mar. 24, 2005) (establishing an international interim authority in Afghanistan); S.C. Res. 1338, U.N. Doc. S/RES/1338 (Jan. 21, 2001) (establishing an international interim authority in East Timor); S.C. Res. 745, U.N. Doc. S/RES/745 (Feb. 28, 1992) (establishing an international interim authority in Cambodia). See also the particularly complex case of Kosovo, S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). For more details see THÜRER, *supra* note 95. See now most recently Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant:*

VI. CONCLUSION

This article reflects some of the complexities of "constitutional interventionism." It tries to sharpen the awareness of how difficult it is to import constitutions into regions where constitutionalism is a minor element of the political culture at best. The main reason why the importation, much less the imposition, of constitutions in the course of coerced regime change is likely to fail is the fact that the authority of constitutions rests largely upon the legitimacy of the processes through which they are generated; substance, although of course important, plays a secondary role. The case of post–World War II Germany, which has been analyzed at some length, is an example of the significance of involving the local population in the process of constitution-making, even if this population acts in the shadow of the sovereign of a conquering military power. Besides the appropriateness of the process of constitution-making in terms of a fair involvement of the people, there are demanding requirements which have to be met in order that a constitution can flourish. In this essay two of them are addressed, namely the prerequisite of statehood, based upon a secular justification of its monopoly of coercive power, and the domestication of "categorical conflicts,"[97] ethnic and religious clashes being the most divisive ones. In view of these requirements, the project of importing constitutions by way of regime change appears quite unpromising. Still, there is the need to assist conflict-ridden and failing states in regaining civilized forms of governance. The article gives a brief account of the constitutionalization of collapsed, or in danger of collapsing, states through international action (largely under the control of the U.N. Security Council). This international involvement in intra-state constitution-making is regarded as an emerging pattern of connecting domestic governance of states with the international and transnational space characteristic of a globalizing world of overlapping jurisdictions and increasingly permeable state borders.

Constitution-making Under External Influence in Iraq, Sudan and East Timor, *in* 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 423 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006).

97. HIRSCHMAN, *supra* note 64.

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